IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

THE CITY OF HUNTINGTON,

Plaintiff,

v.

AMERISOURCEBERGEN DRUG CORPORATION, et al.,

Defendants.

CABELL COUNTY COMMISSION,

Plaintiff.

v.

AMERISOURCEBERGEN DRUG CORPORATION, et al.,

Defendants.

Civil Action No. 3:17-01362 Hon. David A. Faber

Civil Action No. 3:17-01655 Hon. David A. Faber

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE SUR-REPLY

Plaintiffs' proposed sur-reply (Dkt. 1204-1)—filed two weeks after the hearing on the admissibility of IQVIA Xponent data—does not change anything. It addresses so-called "evidence" that could have been submitted and addressed in their opening motion, in reply, or at the hearing. Even now, Plaintiffs did not attach any of the five documents they cite, and far from "correcting" any alleged inaccuracies by Defendants, Plaintiffs mischaracterize the contents of those documents. The Court should reject the belated proposed sur-reply.

Plaintiffs are correct that Defendants did not file a *Daubert* challenge to exclude Lacey Keller's opinions. Regrettably, defense counsel misspoke during the hearing, for which she apologizes. But that does not alter the reasons why the IQVIA Xponent data is inadmissible.

First, it does not matter whether Dr. Keller relied on and testified about the data because an expert's reliance on hearsay does not make the hearsay admissible.¹

Second, Defendants correctly noted that they did not possess the Xponent IQVIA data, they have not used it in operating their suspicious order monitoring systems, and the data is not intended for such purposes. Defendants repeatedly noted those facts in their opposition to Plaintiffs' motion,² and, if Plaintiffs had any basis to challenge those facts, they could and should have addressed them in reply or at the hearing. Plaintiffs' own expert admitted that she is aware of no evidence that Defendants ever possessed the data. She said simply that they "could have" purchased the data.³ Plaintiffs did not contest in their reply or at the hearing the admission by their expert, nor did they cite any additional "evidence" that Defendants ever purchased or possessed the data.⁴

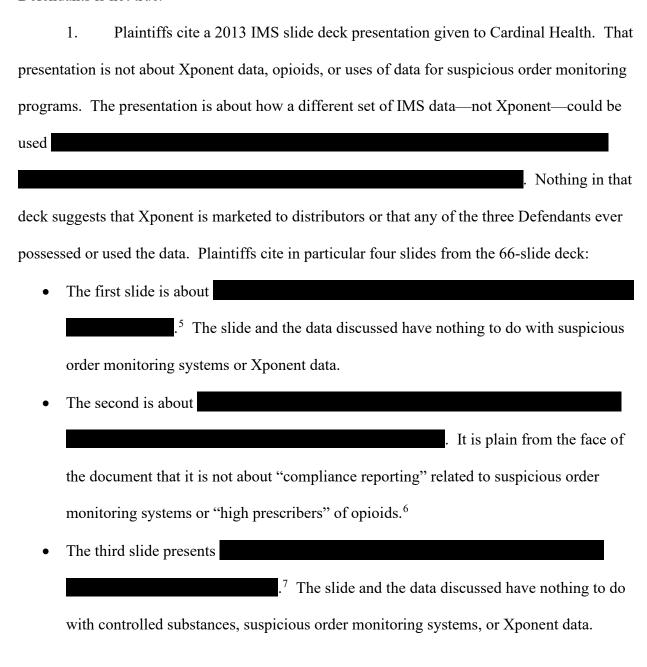
¹ Fed. R. Evid. 703, Advisory Cmte. Notes, 2000 Amend. ("Rule 703 has been amended to emphasize that when an expert reasonably relies on inadmissible information to form an opinion or inference, the underlying information is not admissible simply because the opinion or inference is admitted."); Dkt. 1124 at 4; Ex. 1 at 62:8–25 ("[THE COURT] [I]f Keller testifies that this information was relied upon to support the expert opinions, does that make the data admissible? [MS. HARDIN] No, sir, it does not.... [I]f she is permitted to testify, she could testify only to what she's already said, of course, which is that this data exists and could be purchased. She will, of course, be locked into her testimony, her admissions that we didn't buy it, we didn't have it, and she has no opinions about whether or not we should have gotten it. But experts often rely on—or are permitted to rely on evidence that is otherwise hearsay, as Your Honor well knows. That does not give the underlying evidence independent evidentiary value.").

² See Dkt. 1124 at 1 ("[T]here is no evidence that any Defendant ever purchased or considered purchasing the IQVIA Xponent data series that Plaintiffs seek to have admitted."); *id.* at 2 ("Nothing in IQVIA's marketing material for Xponent holds the data out as providing useful information for wholesale distributors' suspicious order monitoring ('SOM') systems."); *id.* at 8 ("There is not a shred of evidence that any Defendant ever possessed Xponent data.").

³ *Id.* at 3; Dkt. 1124-2 at 12, 15.

⁴ Dkt. 1152 at 2 ("Plaintiffs have shown *constructive* knowledge through their experts") (emphasis added); *id.* at 4 n.4 ("the information ... *could have been* gleaned [by] distributors") (emphasis added).

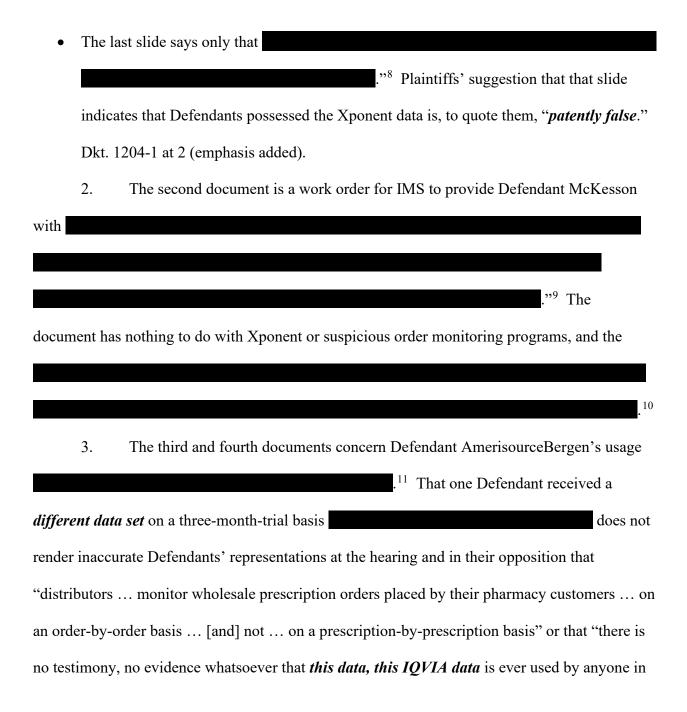
Their belated contention that five documents render inaccurate anything said by Defendants is not true.



⁵ Ex. 2 (CAH_NYConsolidated-0852878).

⁶ *Id.* (CAH_NYConsolidated-0852881).

⁷ *Id.* (CAH_NYConsolidated-0852893).

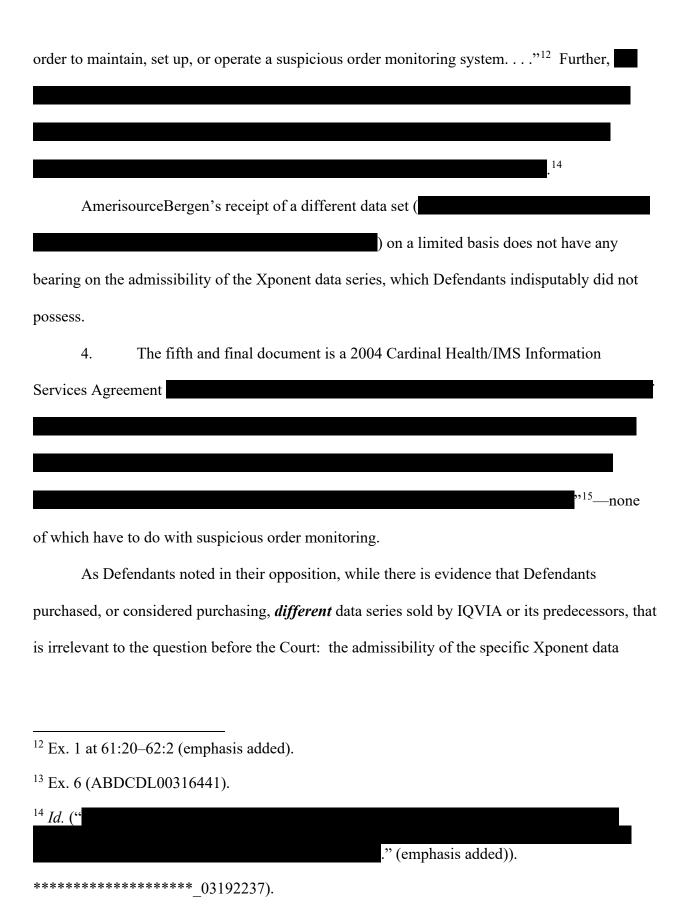


 $^{^{8}}$ Id. (CAH_NYConsolidated-0852887).

⁹ Ex. 3 (MCKMDL00694704).

¹⁰ *Id.* at MCKMDL00694706.

¹¹ Ex. 4, 5 (ABDCMDL05797143, ABDCMDL05797146).



series. Dkt. 1124 at 2. Whether or not Defendants "had and used [other] data sold by IQVIA," there is no dispute that Defendants did not possess or use Xponent data. Dkt. 1204-1 at 4.

* * *

The Court rightly questioned: "What's the link between this, this data and ... the defendants in the case?" The answer remains: "None, none. There is no link ... because not only did [Defendants] not purchase the data," Plaintiffs' expert admitted that she has no opinion that Defendants should have purchased the data. 16

The Court should reject Plaintiffs' untimely, inappropriate motion for leave to file the surreply and deny their motion to admit IQVIA Xponent data.

Dated: January 22, 2021 Respectfully submitted,

/s/ Steven R. Ruby

Michael W. Carey (WVSB No. 635)
Steven R. Ruby (WVSB No. 10752)
David R. Pogue (WVSB No. 10806)
Raymond S. Franks II (WVSB No. 6523)
CAREY DOUGLAS KESSLER & RUBY PLLC
901 Chase Tower, 707 Virginia Street, East
P.O. Box 913
Charleston, WV 25323
Telephone: (304) 345-1234
Facsimile: (304) 342-1105
mwcarey@csdlawfirm.com
sruby@cdkrlaw.com
drpogue@cdkrlaw.com
rsfranks@cdkrlaw.com

/s/ Ashley W. Hardin

Enu Mainigi F. Lane Heard III Jennifer G. Wicht Ashley W. Hardin WILLIAMS & CONNOLLY LLP

¹⁶ Ex. 1 at 59:14–60:23.

725 Twelfth Street NW Washington, DC 20005 Tel: (202) 434-5000 Fax: (202) 434-5029 emainigi@wc.com lheard @wc.com jwicht@wc.com ahardin@wc.com

Counsel for Cardinal Health, Inc.

/s/ Timothy C. Hester

Timothy C. Hester (DC 370707)
Laura Flahive Wu
Andrew P. Stanner
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street NW
Washington, DC 20001
Tel: (202) 662-5324
thester@cov.com
lflahivewu@cov.com
astanner@cov.com

/s/ Paul W. Schmidt

Paul W. Schmidt COVINGTON & BURLING LLP The New York Times Building 620 Eighth Avenue New York, New York 10018 Tel: (212) 841-1000 pschmidt@cov.com

/s/ Jeffrey M. Wakefield

Jeffrey M. Wakefield (WVSB #3894) jwakefield@flahertylegal.com Jason L. Holliday (WVSB #12749) jholliday@flahertylegal.com FLAHERTY SENSABAUGH BONASSO PLLC P.O. Box. 3843 Charleston, WV 25338-3843 Telephone: (304) 345-0200

Counsel for McKesson Corporation

/s/ Gretchen M. Callas

Gretchen M. Callas (WVSB #7136) JACKSON KELLY PLLC Post Office Box 553 Charleston, WV 25322 Tel: (304) 340-1000 Fax: (304) 340-1050 gcallas@jacksonkelly.com

/s/ Robert A. Nicholas

Robert A. Nicholas Shannon E. McClure REED SMITH LLP Three Logan Square 1717 Arch Street, Suite 3100 Philadelphia, PA 19103 Tel: (215) 851-8100 Fax: (215) 851-1420

Fax: (215) 851-1420 rnicholas@reedsmith.com smcclure@reedsmith.com

Counsel for AmerisourceBergen Drug Corporation

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on this 22nd day of January, 2021, the foregoing **redacted** *Defendants' Opposition to Plaintiffs' Motion for Leave to File Sur-Reply* was filed using the Court's CM/ECF system which will send notice of such filing to all counsel of record.

/s/ Steven R. Ruby Steven R. Ruby (WVSB No. 10752)